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In the Supreme Court of the United States

OCTOBER TERM, 1956

No. 183

HENRY W. GRUNEWALD, PETITIONER

v.

UNITED STATES OF AMERICA

No. 184

MAX HALPERIN, PETITIONER

v.

UNITED STATES OF AMERICA

No. 186

DANIEL A. BOLICH, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITIOI

OPINIONS BELOW

The majority and dissenting opinions in the Court of Appeals (Vol. V App., pp. 288–357, 380–393) have not yet been reported.

JURISDICTION

The judgment of the Court of Appeals was entered on April 10, 1956 (Vol. V App., p. 358) and the petitions for rehearing were denied on June 1, 1956 (Vol. V App., p. 394). The petitions for writs of certiorari were filed on June 21, 1956. The jurisdiction of this Court is invoked under 28 U. S. C. 1254 (1).

QUESTIONS PRESENTED

As to all three petitioners:

1. Whether the jury could properly find that a conspiracy to defraud the United States in the operation of the internal revenue laws was in existence during the applicable three-year statute of limitations under instructions authorizing them to convict only if they found that agreement to conceal the initial fraud was part of a continuing agreement to conceal the acts done, that such an agreement was known to each of the participants, and that it was established by evidence other than implication from the crime itself.

2. Whether the trial court committed error when it permitted the government to elicit from petitioner Halperin upon his cross examination that he had invoked the Fifth Amendment in refusing to answer the same questions while a witness before a grand jury.

3. Whether the trial court committed error in allowing the government to prove that its witness Davis had previously made a consistent statement to his attorney.

As to petitioner Halperin (No. 184):

4. Whether it constituted a denial of due process to petitioner Halperin to subpoena him to testify before a grand jury.

5. Whether the evidence supports his conviction for endeavoring to influence the testimony of witnesses.

As to petitioner Bolich:

6. Whether the evidence supports his conviction for conspiracy to defraud.

STATEMENT

After a trial in the United States District Court for the Southern District of New York, all three petitioners were convicted on count 1 of an indictment, returned October 25, 1954, charging a conspiracy among themselves and with others "to defraud the United States in the exercise of its governmental functions of administering the internal revenue laws and of detecting and prosecuting violations of the internal revenue laws free from bribery, unlawful impairment, obstruction, improper influence, dishonesty, fraud and corruption, and in its right and interest in the conscientious, honest and faithful services, judgments, determinations and actions of the defendants" who were employees of the Bureau of Internal Revenue, and to conceal the acts of the conspirators (R. 5–11). Each was sentenced to five years imprisonment and fined on that count (R. 2–4; B. 3–4).[1] Petitioner Halperin alone was convicted on counts 5, 6 and 7 which charged a corrupt endeavor to influence particular witnesses (Marx, Berman, and Tobias) before the Grand Jury in the Eastern District of New York

[1] "R." refers to the Appendix filed by Grunewald and Halperin in the Court of Appeals. "G." refers to the government's Appendix in that court and "B." to the Appendix filed below on behalf of Bolich. "Vol. V App." refers to the volume, filed here, containing the opinions and proceedings in the Court of Appeals.

to give false testimony and to withhold information concerning certain of the transactions involved in Count 1, in violation of 18 U. S. C. 1503 and 1505 (R. 16–19).[2] He was sentenced to two years imprisonment and $1,000 fine on each of these three counts, the sentences to run concurrently (R. 3–4). These judgment were affirmed on appeal (Vol. V App., p. 358), Judge Frank dissenting (Vol. V App. 288–357, 380–393).[3]

The evidence for the government may be summarized as follows:

In 1948, two firms, Pattullo Modes, Inc. a New York dress manufacturing concern, and the Gotham Beef Company, ship chandlers, were under investigation by the Bureau of Internal Revenue for income tax frauds (R. 83–84, 313–315, 588–590). From 1942 to 1946, Pattullo Modes had defrauded the government of corporate and individual income taxes by making off-the-record sales and "jacking up the travel and entertainment accounts" and putting the cash proceeds of over $300,000 in a safe deposit box (R. 20–23). The Gotham Beef Company failed to report income from sales of meat at above-ceiling prices during the war years on their partnership and individual income tax returns.

[2] These counts were dismissed as to other petitioners at the close of the government's case (R. 583).

[3] Petitioner Bolich was also convicted on count 2 which charged him, along with Steinberg and Scherm, as employees of the Bureau of Internal Revenue, with conspiracy in violation of 26 U. S. C. 4047 (e) (4) (R. 11–14). He was sentenced to three years imprisonment and a $5,000 fine on that count, the prison sentence to run concurrently with the five year sentence on count 1 (R. 3–4). The Court of Appeals, holding that both counts related to the same conspiracy, set aside the separate fine on count two (Vol. V App., p. 358).

Their claim was that this income was offset by unreported purchases at over-ceiling prices but the documentary proof of cash premium payments of over-ceiling prices amounted to only 10 and 20 per cent of the $100,000 off-the-record sales (R. 313–315). The Special Agent in the Fraud Division of the Bureau of Internal Revenue who was working on the case recommended it for criminal prosecution (R. 137, 288). Through intermediaries, both firms were referred to the law firm of Schopick and Davis (R. 211–212, 313–315).

In the Pattullo Modes case, Davis, who retained the law firm of Saver and Schwaeber to represent Pattullo Modes before the Bureau of Internal Revenue, conceived the idea of making a spurious voluntary disclosure to the Bureau through the unsuspecting Saver and Schwaeber (R. 308–310).[4] Smith, accountant for Pattullo Modes, agreed to swear to a false affidavit stating that he had made a voluntary disclosure to agent Scherm (R. 310). The claim was made to and rejected by the Chief of the Revenue Agents' Office (R. 310–311). Thereafter, the Pattullo Modes case went forward to the office of petitioner Bolich, then Special Agent in Charge of the Intelligence Unit of the Bureau of Internal Revenue, which office would have authority to recommend for or against criminal prosecution (R. 311). During March 1948, Saver presented the voluntary disclosure claim to Bolich who rejected it (R. 311).

[4] Under the then administrative policy, if a taxpayer voluntarily disclosed the facts of his fraud to the government before investigation turned up the information, criminal prosecution would not be pressed.

Davis told petitioner Halperin, an attorney who shared office space with the firm of Schopick and Davis, that there was no defense on the merits in the Pattullo Modes case and that they needed "real help" (R. 311). Halperin suggested contacting an old friend in Washington (petitioner Grunewald), who was a man of much influence and a close personal friend of Bolich (R. 312). When Davis told Halperin the facts in the Gotham case, Halperin went to Washington to re-establish his friendship with Grunewald (R. 220, 315–316).

During the early summer of 1948, Halperin, Hoffman (who solicited business for Schopick and Davis (R. 208)) and Davis went to Washington. Halperin went to Grunewald's suite in the Washington Hotel while the others waited in the lobby (R. 220). Halperin, on rejoining Hoffman and Davis, reported to them that he had discussed the Gotham Beef case with Grunewald who had received him well (R. 220–221). Grunewald, in Halperin's presence, had made a telephone call in which he identified himself as "Captain Henry" and instructed the other party to "put a red flag * * * on the Gotham Beef case" (R. 221). When Hoffman and Halperin were again in Washington in early July 1948, they went to Grunewald's suite to see if he would handle the Pattullo Modes case (R. 220). At that time, Hoffman was introduced to Grunewald who was neither an accountant nor a lawyer (R. 220, 540). Grunewald agreed to look into the Pattullo Modes case (R. 222).

Bolich's secretary in the New York Special Agents' Office of the Bureau of Internal Revenue testified that

Bolich had received telephone calls from a man who identified himself as "Captain Henry" (R. 508; G. 162–163). Grunewald's secretary during parts of 1949, 1950 and 1951 testified that she would telephone Bolich for Grunewald and, on the latter's instruction, would identify the caller as "Captain Henry" (R. 540). During the summer of 1948, Grunewald was sufficiently close to Bolich to give a party for him in the suite in the Washington Hotel to celebrate Bolich's anticipated appointment as Assistant Commissioner of Internal Revenue (R. 524).

Soon after Grunewald in Washington had agreed to look into the Pattullo Modes case, Bolich in New York requested the Special Agent assigned to the case to give him a status report (R. 433, 499). When Davis learned in July 1948 that the Special Agent on the case intended to circularize all Pattullo Mode customers and banks to learn whether all receipts had been reported, which would not only publicize Pattullo Modes' tax difficulties but would impair their bank credit and customer confidence, he spoke to Halperin (R. 318). Halperin promised to see Grunewald (R. 318). Shortly thereafter, Bolich issued an order that the field investigation in the Pattullo Modes matter be ended at once (R. 434, 498–499).

In the latter part of July 1948, when Davis, at Halperin's suggestion, tried to discuss the Gotham Beef case with Bolich by telephone, he was twice in one day put off by Bolich's secretary (R. 319). Upon learning this, Halperin called Grunewald and re-

ported back to Davis that Grunewald had said Bolich would talk to Davis. Davis again telephoned Bolich, was put through by the latter's secretary, and arranged a meeting for the following day (R. 319). At the meeting the next day in Bolich's office, Davis described the Gotham Beef case and was told by Bolich to submit to Kuehl, who was then reviewing the Special Agent's recommendation of criminal prosecution, the proof of off-setting overceiling cash purchases and net worth statements of the taxpayers (R. 319–320).

On the day of and following his meeting with Davis, Bolich called Kuehl, a subordinate with whom he had not communicated in three years, and informed him of Davis' visit and his contentions (R. 278–279). Kuehl pointed out to Bolich that the files showed that Ronayne, not Davis, was attorney of record for the Gotham Beef Company (R. 278). Bolich assured Kuehl that Davis would submit a power of attorney (R. 278). Davis filed one later (R. 280).

Halperin entered into elaborate negotiations with the taxpayers for the "fee" to be paid the unnamed "Washington associate" (R. 223–224, 323, 329; G. 109–111). In the Gotham case he conferred with Berman, the actual taxpayer in that case, and Tobias, the Gotham accountant, and pressed upon them the urgency of the case and the wisdom of raising the money for the "man in Washington" (R. 141–142, 144, 165–166). Halperin represented to Berman that his friend in Washington was so influential he could walk into many Senators' offices unannounced, that he had con-

nections in the Bureau of Internal Revenue which enabled him to end cases, that the man would have to be paid well before he used up one of his favors, and that his price was $100,000 (R. 140–142). When Tobias asked the name of the Washington associate he was told it was none of his business (G. 56–57). Payment to the "Washington man" was made contingent on the elimination of criminal prosecution in the New York Special Agent's Office; the result was guaranteed (G. 57–58). After much negotiation, during which Halperin made repeated trips to Washington to have Grunewald lower his price, the sum of $65,000 was agreed upon, $60,000 payable in cash in advance for the Washington associate, and $5,000 by check payable to Schopick and Davis (R. 165–166). Halperin said that the price could be reduced so that the Gotham Beef case could be used as a guinea pig in connection with convincing other people in a larger case that they were handling (R. 165). It was agreed that the $60,000 in cash would be delivered in advance to Halperin, the only one trusted by the Washington associate, and to Greenstein, an accountant representing Berman of the Gotham Beef Company, as joint escrowees pending official word from the Bureau of Internal Revenue that the criminal prosecution had been eliminated (R. 166). Berman collected the cash and turned it over to the two escrowees who put it in a safe deposit box (R. 148, 187). Halperin, though asked many times by Greenstein, the other escrowee, refused to identify the Washington associate for whom he was acting (G. 84).

Thereafter, Kuehl, who had been reviewing the Gotham case, decided the case was too weak to warrant prosecution and reversed the Special Agent's recommendation of criminal prosecution (R. 283). Davis brought Tobias in to hear the decision directly from Kuehl (R. 284). Authorization was then given for release of the money (R. 171, 187). When Halperin took the money from the safe deposit box, he told Greenstein that he would deliver it to Washington (R. 187). Later, in October 1948, Halperin confirmed to Davis that the money had been delivered to Grunewald (R. 328). Davis represented Gotham during 1949 in the negotiations for determining civil tax liability (R. 173, 341).

Halperin also took the lead in dealing with the Pattullo Modes taxpayers, once his "Washington associate" had "promised to help" (R. 329). During the summer of 1948 there were frequent meetings between Halperin and the Pattullo Modes taxpayers (R. 32). Halperin, after reporting to the taxpayers that he had seen his "friend" in Washington and that progress was being made, told Marks, a stockholder of Pattullo Modes, in September 1948, that criminal prosecution could be avoided for $150,000 in cash (R. 32). When Grunewald's last figure was $125,000, Davis and Halperin went to Washington and met Grunewald in his office in the Munsey Trust Building; Halperin conversed privately with Grunewald and later, in Grunewald's presence, told Davis, "Irving, in the Pattullo case Mr. Grunewald has agreed to accept $100,000" (R. 329–330). Davis, after being introduced to Grunewald, thanked him for reducing the price to $100,000

in the Pattullo matter, and Grunewald said, "O. K., O. K." (R. 330).

When agreement was reached on the $100,000 price, Davis explained to Marks that the cash was not to be raised by the sale of securities or by withdrawals from banks as such transactions would be reflected in records (R. 34). The Pattullo taxpayers raised $75,000 through unreported cash sales and borrowed the balance from a friend (R. 27, 35). Upon receiving the money, Davis turned it over to Halperin to be held in escrow in a safe deposit box especially procured for the occasion (R. 331).

The firm of Saver and Schwaeber, (*supra*, p. 5), unaware of the interest of Halperin and Grunewald in the Pattullo Modes case, pursued the voluntary disclosure line of defense in the Special Agent's Office (R. 331). When Baradel, Chief of the Conference Section in the Special Agents' Office, requested an affidavit from Smith (the accountant for Pattullo Modes) setting forth the facts of the voluntary disclosure, Davis prepared a false affidavit which was sent to Saver for submission to Baradel (R. 331). After hearing both Smith and agent Scherm, Baradel ruled that there had been no voluntary disclosure (R. 476, 483–484; G. 154). He testified that "* * * [Smith] had the worst memory I had ever come across in my long experience or * * * he was lying" (R. 484). According to Davis, Grunewald told Halperin that Saver and Schwaeber should be kept in the case to allay their suspicions when the prosecution was dropped (R. 321).

In August 1948, when Bolich ordered Special Agent Clayton to drop his investigation of Pattullo Modes, he gave as his reason that the taxpayers had agreed to cooperate and make available the required information (R. 434; G. 154). During the next three months, Clayton was unable to secure the cooperation of Pattullo Modes, even though he contacted Saver (R. 435). Davis recounted to Halperin the dangers of cooperating without knowing "* * * where we are going for sure" (R. 331–332). Halperin told Davis to have Saver see Bolich in Washington (R. 332). When Saver saw Bolich, Bolich promised him that if the taxpayers cooperated fully there would be no criminal prosecution (R. 332). In the two months that followed, Pattullo Modes cooperated fully with Special Agent Clayton, who was permitted to examine books and records of the firm and net worth statements of individual taxpayers disclosing their unreported income (R. 440). The disclosure was complete except for the unrecorded sales by which the $100,000 cash for Grunewald had been raised (G. 38–40). Special Agent Clayton was unaware that a commitment not to prosecute had been made (G. 144–145). While Clayton was investigating the case, Bolich went to Washington as Assistant Commissioner of Internal Revenue (R. 508). He took up residence in the Washington Hotel in Grunewald's suite and not, as the hotel records show, with Harry Woodring, former Secretary of War (G. 175). The hotel records also show that Bolich was not billed for his room rent. Grunewald paid the bills (R. 521, 537).

Halperin, about the time of Bolich's transfer to Washington, assured Mrs. Segel of Pattullo Modes that there was nothing to worry about as all arrangements had been made and that they simply had to wait for the proper time for the no-prosecution result to be put through (R. 107–108). Halperin was in Grunewald's suite on January 3, 1949 (Gov. Exh. 69; G. 172–174; R. 512–513). On January 4, 1949, the Pattullo Modes taxpayers signed confessions (R. 440). On January 5, Bolich, as Assistant Commissioner in Washington, telephoned Baradel, Special Agent in Charge of the New York fraud bureau, and for the first time disclosed to an Internal Revenue official his promise to the Pattullo Modes taxpayers that there would be no prosecution (R. 475–476). At the time of the telephone call, there had been no official communication to Bolich informing him that the taxpayers had signed confessions (R. 443–444). The only official information Bolich had ever received about the Pattullo Modes case was the sketchy five months' old status report (R. 443–444; G. 145–146). On January 10, 1949, Baradel, faced with Bolich's recently disclosed promise, called a formal conference with the Pattullo Modes principals and announced that a decision had been made not to prosecute (R. 477–478).

On January 13, 1949, Halperin, Hoffman, Schopick, and Davis removed from the safe deposit box the $100,000 in cash delivered by the Pattullo Modes principals (R. 227–228). On the same day, Hoffman and Halperin left for Washington by train taking the money with them (R. 229). Grunewald met the train

at Union Station in Washington and he and Halperin walked off together with the money (R. 230). Washington hotel records show that Halperin checked in at the hotel on January 13, 1949, and checked out in a few hours. The room rent was charged to Grunewald (Gov. Exh. 70; G. 173–174). Halperin later reported that he had delivered the money to Grunewald (R. 335).

During the rest of 1949, while an audit to determine the amount of the Pattullo tax liabilities and civil fraud penalties was being conducted, the Pattullo taxpayers were cognizant of the danger of the audit "* * * upsetting the applecart * * *" (R. 128–129). A sum of $25,000 to $40,000 was requested from Pattullo Modes for the "boys in New York", so that on a detailed examination of the civil tax liability no one would "* * * raise a fuss about the phony deal that had been put through" (R. 42, 128; G. 29). The civil tax audit and determination of tax liability for Pattullo Modes for the years 1942–1946 was completed late in 1950 (R. 470–471; G. 7).

In November 1949, ten months after the decision not to prosecute, Special Agent Clayton's report was sent to Bolich by Baradel (R. 478–479). The report stated that Bolich's commitment to the Pattullo taxpayers was the only reason that prosecution was not recommended (Gov. Exh. 56). Bolich, on receiving the report, called Baradel at his home on a Sunday and asked him to write an explanatory memorandum to "* * * take a little heat off the situation" (R. 479).

In June 1950, Hoffman, business solicitor for Schopick and Davis, learning of a case in which the indicated tax evasion was between $750,000 and $1,000,000,

made contact with another group of taxpayers known to this record as the Glovers (R. 342–345). At a meeting with the Glovers, Halperin and Davis stated that the case could be handled by a "person in Washington whom we had used in other cases" for a substantial sum in cash (R. 345). Grunewald established his price with Halperin as between $175,000 and $200,000 (R. 351). When the Glovers rejected this amount, Halperin made another trip to Washington in an attempt to reduce the price (R. 351). Since the Glovers refused to pay more than $100,000, the Davis firm refused to handle the case (R. 351). Between the time of the Glover negotiations and early 1951, Halperin made as many as ten trips to Washington to visit Grunewald (R. 539).

In the same summer of 1950, Bolich, who was still Assistant Commissioner of Internal Revenue, borrowed the Washington Hotel records of his occupancy in the hotel for the preceding year because he "* * * just wanted to review his bills of approximately a year back" (G. 165). When the so-called King Committee of the House of Representatives subpoenaed these hotel records a year later in December 1951, the hotel management wrote to Bolich requesting him to return the records (G. 168). Bolich denied ever receiving the records (G. 169). It was during the period covered by the missing records that Bolich was living in the Grunewald suite which was carried in the name of Harry Woodring (G. 172).

In September 1950, Bolich hired Daniel Olsen, a carpenter from Brooklyn, New York, to do some work

for him in his home there (B. 21). Olsen testified that on Bolich's instruction he opened up the baseboard in the clothes closet in the upstairs room for a compartment that could be used to store papers (B. 21; R. 553–554). He said that Bolich told him it was to be a hiding place for secret Washington papers (R. 555).

Early in 1951, the King Subcommittee of the House Committee on Ways and Means began its investigation of the Bureau of Internal Revenue. In the summer of 1951, the Subcommittee called for the Bureau of Internal Revenue file on the Pattullo Modes case (G. 143). Bolich learned of this congressional request from Baradel (G. 156–157). Halperin suggested the taxpayers be contacted at once (R. 360). Marks and Mrs. Segel, Pattullo taxpayers, were called in to the offices of Schopick and Davis, and in the presence of Halperin, were given strict instructions to talk to no one about the case, particularly not to investigators (R. 360–361).

An investigator from the Subcommittee learned from an inadvertent remark of Mrs. Segel that a false claim of voluntary disclosure had been made (R. 361–362). Her statement to the investigator directly contradicted the affidavit filed by Smith, the accountant for Pattullo Modes, in support of the voluntary disclosure scheme (R. 362). When Smith was subpoenaed to appear before the Subcommittee, he followed the advice of Davis that he stick to his affidavit and he gave false testimony (R. 96, 363). When Davis was called before counsel of the Committee, he too lied about the affidavit (R. 364–365). Halperin

stated that Grunewald was aware of the situation and was prepared to help if he could (R. 369–370). When Smith was arrested on August 30, 1951, Halperin Davis, Hoffman, and Schopick met to decide on a course of action (R. 365). Davis reported that the Pattullo people would invoke the Fifth Amendment if questioned (R. 366–367). They all said they would stand pat (R. 365–366).

In February 1952, a Grand Jury was empaneled in the Eastern District of New York to investigate violations of the internal revenue laws and their administration and enforcement (G. 142–143). Revenue agents examined the books and records of the law firm of Schopick and Davis and of accountant Smith (R. 367). Halperin, Hoffman, Davis, and Schopick discussed the handling of the grand jury (R. 366). During the next few months the grand jury subpoenaed Deutsch, Hoffman's brother-in-law (who had been connected with the initial contact in the Pattullo Modes case), Hoffman, Halperin, Schopick, Davis, the Pattullo taxpayers, the Gotham taxpayers, and Grunewald's personal secretary (R. 49, 152, 369, 541).

Revenue agents found a $500 check from Smith's accounting firm payable to Deutsch for his service in contacting the Pattullo Modes taxpayers in 1947 (R. 367). When Smith was subpoenaed before the grand jury, Schopick told him to state that the $500 check was merely an indirect loan from Hoffman to Deutsch (R. 98–99, 367).

Halperin, Davis, Schopick, and Hoffman met on another occasion and decided that the Pattullo taxpayers should be persuaded to continue withholding

information from the investigators (R. 368). Davis told Marks, a Pattullo stockholder, that he "* * * would be crazy to talk * * *" and implored him not to do so (R. 368, 49–50). Davis also saw Mrs. Segel, another person directly interested in Pattullo, and urged that the Pattullo people should be silent before the grand jury about what had transpired in their case (R. 117–118). However, they decided to tell their story to the grand jury (R. 50–125).

In early 1952, Halperin and Davis told Tobias of the Gotham Beef Company that no one had talked about the Gotham case (R. 172). They said that if everyone was quiet the investigation would blow over (R. 172). In February 1952, they again visited Tobias and told him that he, Tobias, and Berman should remain silent; that Halperin had done Berman a good turn and Berman should not hurt him by talking (R. 173). The Pattullo Modes people had testified before the grand jury before Halperin again saw Tobias (R. 173). When Halperin did meet Tobias, he sought to persuade Tobias and Berman to remain silent, stating that the "Washington associate" was going to "stand silent"; that he, Halperin, would be silent; and it would be a terrible thing for him if they testified (R. 173–174).

In May 1952, Nancy Hain, Grunewald's personal secretary, was subpoenaed to appear before the grand jury (R. 541). She knew that Halperin had visited Grunewald often; that Bolich had lived in Grunewald's suite at the Washington Hotel for a time; that Grunewald used the name "Captain Henry"; and that

Grunewald was in the "tax business" (R. 536–541). Immediately after she was subpoenaed, Grunewald phoned and offered to furnish her money for a trip to New York. He told her that she "* * * didn't need to discuss it, and * * * [she] could just say [she] didn't remember" (R. 541–543). Grunewald's messenger arrived that night with the money for her (R. 543). Nancy Hain, before the grand jury, falsely stated in answer to questions put to her by the United States Attorney that she didn't remember (R. 545).

In submitting the first conspiracy count to the jury, the trial court pointed out that the indictment charged that the conspiracy comprehended within it a conspiracy to conceal the true facts from investigation, should investigation thereafter eventuate, and that this was an important element in view of the three-year statute of limitations (R. 750). He charged (R. 751–753):

> To determine whether certain of the alleged overt acts were in furtherance of the object of the conspiracy, you have to determine the duration of the conspiracy. Did it end when the Pattullo Modes people and the Gotham Beef people received an assurance of no prosecution from the Bureau of Internal Revenue, or was a part of the conspiracy a continuing agreement to conceal the acts done pursuant thereto? In determining whether a part of the conspiracy was an agreement to continue to conceal the illegal acts after their consummation, you may not imply that such an agreement was part of the conspiracy. You would have to find from

the evidence of the acts and declarations of the co-conspirators that there was an understanding or agreement to conceal the conspiracy. If you find that such an agreement or understanding to conceal the conspiracy was not a part of the conspiracy to defraud the government, but no more than an afterthought brought to the surface when the co-conspirators were confronted with the Grand Jury and King Committee investigations, then you must find, as a matter of law, that the defendants are not guilty of the crime charged in the first count of the indictment. If you find that the evidence shows, beyond a reasonable doubt, that as a part of a conspiracy to defraud the government, there was an agreement or understanding to conceal the illegal acts and that this too was an objective or part of the conspiracy, then you may find that such understanding was a part of the conspiracy. However, you must additionally determine whether this objective of the conspiracy was known to the defendants. If this objective was known originally by only part of the conspirators but thereafter during the existence of the conspiracy, the scope of the conspiracy was extended so as to include such an agreement to conceal, and if you find that some of the defendants did not know of the expansion to include the agreement to conceal, you may not impute to them the knowledge of their co-conspirators and they could not be found guilty of the crime charged in Count One.

Now, therefore, as to the defendants Halperin, Grunewald, and Bolich, you have the questions of fact, first, as to whether they became parties to a conspiracy to defraud the

United States, and that part of this conspiracy was to make continuing efforts to avoid detection and prosecution by any governmental body; second, whether they knew the general objectives of the conspiracy; and third, whether any one of the conspirators took any overt act within three years prior to October 25, 1954 to accomplish the result of that conspiracy. If you can answer these questions all in the affirmative, beyond a reasonable doubt, then you would be justified in returning a verdict of guilty on the first count of the indictment as against each one of these three defendants. If you cannot find that you can answer these questions in the affirmative, beyond a reasonable doubt, as to these three defendants, then as to the ones concerning whom you cannot so answer it, you should return a verdict of not guilty.

ARGUMENT

1. Admittedly, the only overt acts alleged and proved to have been committed within the three-year period preceding the return of the indictment (on October 25, 1954) were acts of concealment. Petitioners argue that such overt acts were not sufficient to toll the statute of limitations; that the actual conspiracy had ended more than three years before the return of the indictment; and that their acts of concealment must be viewed either as individual and independent efforts of the petitioners to cover up their wrongdoing or as the consequences of a new and separate conspiracy entered into subsequent to the completion of the conspiracy charged in the indict-

ment (No. 183, Pet. 8–14; No. 184, Pet. 17–21; No. 186, Pet. 12–13).

As appears from the portion of the charge quoted in the Statement (*supra*, pp. 19–21), the case was submitted to the jury with specific instructions that petitioners could be found guilty only if the jury found that agreement to conceal was part of the original conspiracy to defraud the government, not "an afterthought" inspired by the King Committee investigations. And the jury were also expressly charged that they could not, merely from the crime itself, "imply that such an agreement was part of the conspiracy" (R. 752), but that such an original agreement to conceal must have been shown by the evidence. Hence, the basic question on this aspect of the case is not, as petitioners endeavor to present it, whether one may imply agreement-to-conceal simply from the conspiracy to defraud, but whether a conspiracy to defraud the government can ever embrace, as an actual part thereof, an agreement to conceal the wrongful activities.

Judge Frank, in his dissenting opinon on the petition for rehearing (Vol. V. App. 380–393), takes the position that concealment could be part of the conspiracy to defraud only if the agreement to conceal, and the acts of concealment, were "to block prosecution of the taxpayers for tax evasion" (Vol. V. App. 383, 387). He seems to read the decisions of this Court in *Krulewitch* v. *United States*, 336 U. S. 440 and *Lutwak* v. *United States*, 344 U. S. 604, as holding that *no* conspiracy charge can ever embrace an agreement to conceal the crime that was the object

of the conspiracy, no matter what the evidence of such an actual agreement to conceal. But nothing in those decisions supports that view; rather, they assume the contrary. While the Court in *Krulewitch* refused to infer from acts of concealment, following the completion of the substantive offense, an agreement to conceal as part of the original conspiracy, it did not deny that an agreement to conceal could have been factually a part of the conspiracy when first devised. Mr. Justice Jackson, concurring, stated (pp. 455–456):

> * * * Of course, if an understanding for continuous aid had been proven, it would be embraced in the conspiracy by evidence and there would be no need to imply such an agreement. Only where there is no convincing evidence of such an understanding is there need for one to be implied.

Similarly, in *Lutwak*, the Court did not question the propriety of the allegation in the indictment that the conspiracy included an agreement to conceal the fraud charged, but held (344 U. S. at p. 616) only that

> * * * there is no evidence in the record to establish as a part of the conspiracy that the conspirators agreed to conceal the conspiracy by doing what was necessary and expedient to prevent its disclosure.

This statement implies that if the evidence had shown that the original agreement did contemplate acts of concealment, overt acts of concealment could have supported the charge.

On principle there is no reason why a conspiracy to conceal acts of wrongdoing cannot be part of a con-

spiracy to defraud. The government is defrauded by any act which impairs honest administration. *Haas* v. *Henkel*, 216 U. S. 477. When corrupt officials and their confederates deliberately plan, not only to act dishonestly, but to keep the dishonesty from being discovered and corrected, they are as clearly impairing the functions of government by the concealment as by the original fraud. The whole scheme is one continuous plan to defraud and injure the United States.

Thus, the question on the statute of limitations in this case comes down to the issue of whether the evidence supports the finding, which under the charge the jury had to make, that from its inception the conspiracy embraced an agreement, known to all the petitioners, not only to act corruptly in relation to tax cases, but to conceal and cover up the acts of wrongdoing. And, in this connection, the conspiracy cannot be treated, as petitioners would have the Court do, as relating to separate, isolated tax cases. So far as these petitioners are concerned, the majority of the court below were clearly justified in stating on the basis of this record that the "proof of * * * a single, overall conspiracy is simply overwhelming" (Vol. V. App. p. 291).

The conspirators had worked out and developed an organization for "fixing" tax cases pending against tax evaders. The organization, extending between New York and Washington, included a high official in the Bureau of Internal Revenue who had power to dispose of tax cases, contact men in both cities, a firm of attorneys to act as a front, and "chasers" to discover clients who might be in tax trouble. The conspirators

were so organized as to be able to give assistance to taxpayers who could meet their price. Their handling of the Gotham Beef Company case and the Pattullo Modes matter were but two operations of the one conspiracy, not two separate conspiracies as petitioners contend. The contact and negotiations with the Glovers, although futile, formed another episode in the working of the conspiracy. The over-all organization and methods used by petitioners mark their activity as one broad, continuing conspiracy.[5]

This type of continuing, broad-scale scheme, by its very nature, normally embraces as an integral part agreement as to the necessity for constant and continuous concealment beyond that involved in the implied understanding of ordinary conspirators that crime will not be disclosed. The difference is analogous to the well-defined distinction made under the mail fraud statute between use of the mails after a fraud has been completed and use of the mails, as in a check-kiting scheme, to conceal a particular aspect of a continuing project. See *Kann* v. *United States*, 323 U. S. 88, 94–95.

There is no need, however, to rely only on the intrinsic nature of the scheme as showing that agreement to conceal was part of the conspiracy to defraud. There is in this record ample evidence establishing the understanding of all the petitioners that there was a constant and continuous necessity for active acts of con-

[5] The argument that more than one conspiracy was proved is separately made by petitioner Bolich (No. 186, Pet. 14) and raised as a question, but not argued, by petitioner Halperin (No. 184, Pet. 4).

cealment at all times, from the beginning of the conspiracy down into 1952 when the overt acts charged in the indictment were committed. In all the negotiations as to price with the Glovers, the Gotham Beef Company, and Pattullo Modes, the conspirators took great care not to reveal the identity of their "Washington associate". Undoubtedly for the same reason, Grunewald had himself referred to as "Captain Henry". And the need for such concealment continued to be recognized well into 1952, when Halperin again told Tobias of the Gotham Beef Company as he had told him before, that it was none of his business whether Grunewald was that Washington associate (R. 173). Other factors of concealment were the use of cash instead of checks; the emphasis on personal visits; the directions to Pattullo as to how to raise the money for the "Washington associate" (*supra*, p. 11).

It is also clear that all parties recognized the need for concealment long after the decisions not to prosecute were reached in the Pattullo Modes and Gotham Beef cases. This is so, not only because of the continuing nature of the general conspiracy, but also in relation to those particular cases because the results reached could have become undone if there were not constant unremitting vigilance. Certainly, so long as civil liability was being determined, the necessity for active efforts to conceal was self-evident. The understanding of the need for continued deception is particularly evidenced by the fact that Pattullo Modes paid $40,000 during the pendency of the civil proceedings to make certain that no questions were raised as to the prior criminal determination (see *supra*, p. 14).

It is in this connection—and that is properly its only relevance—that the majority of the Court of Appeals pointed out (Vol. V. App. pp. 302–303) that the six-year statute of limitations did not run in favor of the taxpayers until 1952, so that the concealment was necessary "not only to protect the conspirators from a conspiracy prosecution but also to protect the taxpayers from a tax evasion prosecution."

Under these circumstances, the fact that the petitioners could not in the beginning have foreseen the particular contingency represented by the King Committee investigation is, as the majority below held (Vol. V. App. p. 304), unimportant. So long as the conspiracy of which they were a part was known to them to require active steps of concealment while they were in cooperation with each other and while their "fixed" tax cases were not fully closed, it was not necessary that the conspirators know in advance the precise events which would call for the carrying out of their agreement to conceal. It was enough that the acts done were of the type contemplated by the original agreement. Cf. *Pinkerton* v. *United States,* 328 U. S. 640; *United States* v. *Perlstein,* 126 F. 2d 789 (C. A. 3), certiorari denied, 316 U. S. 678.[6]

Recognition of the continuous nature of the conspiracy-to-conceal revealed by the particular facts of

[6] Petitioner Grunewald argues in effect (No. 183, Pet. 2–3, 11) that the evidence as to conspiracy to conceal must be held insufficient as to him because he was acquitted by the court on the specific counts (5, 6 and 7) relating to attempts to influence the testimony of witnesses Marks, Berman and Tobias before the Grand Jury. But, as the argument in the text has developed, those specific acts of concealment were only one manifestation of

this case will not, as petitioners argue, mean that any conspiracy can be indefinitely extended beyond the period of limitations. The judgment of the courts below is based on the factual realities of this case in which the indictment charged and the evidence proved an agreement which from the start contemplated active and continuing acts of concealment involving strong and constant cooperation among the conspirators throughout the period, in relation both to their general activities and to the particular tax cases which had not been fully closed during the whole period covered by the indictment. The bar of the statute of limitations is not being denied to conspirators after years of inactivity and separation. Here, the jury found, as the facts justified, that petitioners were, within three years of the indictment, engaged in continuous acts of cooperation deliberately to thwart the law, pursuant to their known and previously-established agreement.

2. All three petitioners contend (No. 183, Pet. 15–16; No. 184, Pet. 10–17; No. 186, Pet. 17–18) that the trial court erred when it permitted the government to impeach the credibility of petitioner Hal-

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the broader and earlier understanding that the conspirators would cover up and conceal their wrongdoing, an understanding in which the jury properly found that Grunewald participated. The great efforts made to conceal his identity from the very beginning, including his refusal to deal with anyone but Halperin and to accept any payment but in cash, clearly establish that agreement-to-conceal was part of the conspiracy in which he joined, and his continuing participation in that effort was shown by his own acts in endeavoring to have his secretary "forget" the alias under which he made contact with Bolich (see the Statement, *supra;* pp. 18–19).

perin, who had taken the witness stand to testify in his own behalf, by showing on cross-examination that he had previously, when appearing before a grand jury under subpoena, invoked the Fifth Amendment privilege against self-incrimination in response to similar questions. The court's ruling was required by the decision in *Raffel* v. *United States*, 271 U. S. 494. *Raffel* held that a defendant who had taken the stand to testify for himself during a second trial on a conspiracy charge could properly be questioned on cross-examination as to his failure to take the stand in his own behalf during the first trial. In reaching this conclusion, the Court relied upon the rule that immunity from self-incrimination may be waived by a defendant who wishes to offer himself as a witness. Mr. Justice Stone, writing for a unanimous court, stated (at p. 499):

> The safeguards against self-incrimination are for the benefit of those who do not wish to become witnesses in their own behalf and not for those who do. There is a sound policy in requiring the accused who offers himself as a witness to do so without reservation, as does any other witness. We can discern nothing in the policy of the law against self-incrimination which would require the extension of immunity to any trial *or to any tribunal other than that in which the defendant preserves it by refusing to testify.* (Emphasis added.)

Under this broad language, the fact that the refusal to testify in this case occurred before a grand jury, while in *Raffel* it took place at a prior trial, is without

significance. The same principle applies to both situations. See *Viereck* v. *United States*, 139 F. 2d 847, 851 (C. A. D. C.), certiorari denied, 321 U. S. 794; *United States* v. *Klinger*, 136 F. 2d 677 (C. A. 2), certiorari denied, 320 U. S. 746, both involving claims of privilege before a grand jury.

Petitioners, relying in large measure on the first dissenting opinion of Judge Frank (Vol. V. App. pp. 316–357), urge that *Raffel* has been nullified by the subsequent decisions of this Court in *Johnson* v. *United States*, 318 U. S. 189 and *Slochower* v. *Board of Higher Education*, 350 U. S. 551. But there is a radical difference between the facts in those cases and the situation before the Court in *Raffel* and here.

In the *Johnson* case the defendant, on trial for wilful evasion of income taxes for 1935, 1936 and 1937, took the witness stand in his own behalf. When asked by the government about his income in 1938, he claimed his Fifth Amendment privilege against self-incrimination and refused to answer. Although the trial court upheld his claim of immunity, it allowed the government to comment on his refusal to answer in summation to the jury, and instructed the jury that the refusal could be considered in assessing the defendant's credibility. This Court, acknowledging that it was error for the trial court to uphold the defendant's claim of privilege once he had taken the stand to testify for himself, ruled that the trial court, having sustained the privilege, erred in allowing the government to comment on, and the jury to consider, the claim of privilege. The Court ruled, in substance, that the trial court was estopped by its own error. Thus, *Johnson*

involved comment on a claim of privilege in the very same trial where the privilege was claimed and allowed; in *Raffel* and here, the comment was on a claim of privilege made in a prior proceeding by a defendant who later elects to testify. *Johnson* concerned the consequences immediately flowing from an accepted claim of privilege; *Raffel* and this case involve, on the other hand, the effect of the exercise of the right of a defendant to testify in his own behalf. Since *Johnson* cannot fairly be read as overruling *Raffel*, even by implication, there is no need to reconsider in this case the problems set at rest in *Raffel*.

Nor does the *Slochower* case give support to petitioners. There, the Court held that the application to Slochower of the New York law which provides automatic dismissal for any city employee who invokes the privilege against self-incrimination violated the due process clause of the Fourteenth Amendment. This holding includes a reaffirmation of the established principle that no inference of guilt can be drawn from the claim of constitutional privilege. But it does not follow from this ruling that, where, as here, the privilege has been deliberately and voluntarily waived at a trial, a former claim of privilege has no relevance to the truth of the defendant's present testimony. While the *Slochower* case decided that the immunity given by the Fifth Amendment was to be accorded a wide reach, *Raffel* determined that a waiver of the privilege was also complete. The two cases are not antipathetic; they deal with converse problems.

As a corollary to the main argument, petitioner Halperin asserts (No. 184, Pet. 14–16) that the trial

court erred when it refused to instruct the jury that "an innocent man may honestly claim that his answers may tend to incriminate him." However, it is not error to refuse to instruct in language submitted by counsel if the charge given correctly states the law applicable to the case. *Sugarman* v. *United States*, 249 U. S. 182, 185; *United States* v. *International Fur Workers Union*, 100 F. 2d 541, 546 (C. A. 2), certiorari denied, 306 U. S. 653. That was done here. The court instructed the jury that petitioner Halperin had a right to invoke the privilege before the grand jury, that his act of invoking the privilege could not be considered as proof of his guilt of the crimes charged against him, and that his act of claiming the privilege could be considered only in weighing the credibility to be given to his testimony at the trial (R. 768).

3. Another contention urged by the three petitioners relates to the testimony of Davis on his redirect examination that in March 1952 he told his attorney the facts concerning the $100,000 and the $60,000 payments made by Pattullo Modes and Gotham Beef to the conspirators and authorized his attorney to communicate the statement hypothetically to the United States Attorney (No. 183, Pet. 16–17; No. 184, Pet. 22–23; No. 186, Pet. 17).

Davis' cross-examination had revealed several facts that tended to impeach his credibility. It was shown that he had been indicted in April 1954 for tax evasion based on alleged failure to report $160,000 as taxable income in 1948 and 1949; he had also pleaded guilty

to an indictment for conspiracy. In 1953, his wife had sued him claiming that he held $125,000 in cash as a joint tenant with her. These facts were pointed to as furnishing a motive for Davis to fabricate his testimony. The 1952 statement by Davis to his attorney was made when no indictments had been found against Davis and suit had not been brought against him by his wife. The statement was proffered and received on the theory that the jury might find that it was made at a time when the motive to falsify did not exist, and therefore give it some weight on the issue of his credibility.

When the veracity of a witness has been challenged on the ground that he has a motive to lie, statements consistent with what he said on the stand, but made before the motive to fabricate arose, are competent. *Ellicott* v. *Pearl,* 10 Pet. 412, 439; *Di Carlo* v. *United States,* 6 F. 2d 364, 366 (C. A. 2); *Dowdy* v. *United States,* 46 F. 2d 417, 424 (C. A. 4). Where it is reasonable for the jury to find that the prior statement did in fact antedate the motive, the court should admit the prior statement. *Di Carlo* v. *United States, supra,* at 367. The contention here that the motive to fabricate antedated the prior statement is purely speculative. While Davis may have sensed an impending change in the fortunes of the conspiracy, he could not then have known that he would be twice indicted and sued by his wife. It was entirely reasonable for the trial court to conclude that there was no motive to fabricate, such as existed at the time of trial, when the

statement was made, and, therefore, to leave the matter to the jury.[7]

4. Petitioner Halperin argues (No. 184, Pet. 16–17) that he was denied due process when he was subpoenaed, before he was indicted, to appear as a witness before a grand jury, other than the one which indicted him, in an investigation which could have implicated him as a potential accused.[8] By his argument, petitioner implicitly equates the position of a witness before a grand jury with that of a defendant on trial before a petit jury. The law has never recognized such an assimilation.

Every citizen is under a clear duty to aid in the administration of justice by giving truthful testimony when called upon to do so (*Blair* v. *United States*, 250 U. S. 273, 281), whether it be before a court, a grand jury (*Blackmer* v. *United States*, 284 U. S. 421, 438), or a committee of Congress (*United States* v. *Bryan*, 339 U. S. 323, 331). Any exception from this positive rule must be justified by the need to protect a very real interest. *United States* v. *Bryan, supra.* The fear of a witness that he may be indicted by a grand jury has not been recognized as a valid excuse for not

[7] Characterizing the prior statement of the witness as "hypothetical" is inaccurate. The statement, accurately presenting all the intricate workings of the conspiracy, was made to the witness' attorney without qualification. The only restriction imposed by the witness on the attorney was that, when the latter would repeat the statement to the United States Attorney, he should present it as a hypothetical situation. The limitation on the repetition does not destroy the value of the clear statement made by Davis to the attorney.

[8] This question was not presented to nor considered by the court below.

appearing or for quashing an indictment if he does appear and is indicted. *United States* v. *Scully*, 225 F. 2d 113, 116, 118–9 (C. A. 2); cf. *Wilson* v. *United States*, 162 U. S. 613, 623–4; *Powers* v. *United States*, 223 U. S. 303, 313–4.

Moreover, the record does not support Halperin's claim that he was the "target of the Grand Jury investigation," that he was a *de facto* accused, or that he was improperly prejudiced. There is nothing in the record that indicates that he, rather than any other person, was the object of the particular grand jury investigation of fraud in the administration of the internal revenue laws. Nor was he legally prejudiced in being called. He is an attorney who has practiced law for many years, and he sought advice of counsel before he appeared before the grand jury in response to the subpoena. That he was fully cognizant of his rights was thoroughly demonstrated by the fact that he invoked the Fifth Amendment.

5. Petitioner Halperin, who contended before the court below that the evidence was insufficient to sustain his conviction on counts 5, 6 and 7, now raises the same question by arguing that the court ruled that he, an attorney, was guilty of corruptly attempting to influence a witness before a grand jury by advising the witness to plead the Fifth Amendment (No. 184, Pet. 24–26). The evidence adduced at the trial establishes that his characterization of the holding below is incorrect.

Count 5 charged that Halperin, on March 15, 1952, aided and abetted Davis, Hoffman, and Schopick in corruptly endeavoring to induce Morton Marks, a

Pattullo Modes stockholder, to give false evidence or to withhold the truth from the grand jury. The evidence showed that in early March 1952, after the Pattullo Modes stockholders had retained new counsel, Davis at last succeeded in obtaining a meeting with Morton Marks, one of the stockholders, who was about to testify before the grand jury. When Marks told Davis that he would be guided by advice of counsel before the grand jury, Davis stated, "Well, you can't talk. You would be crazy to talk. * * * Morton, are you going to turn me in?" (R. 49–50). There was also evidence of a March 1952 meeting attended by Halperin, Davis, Schopick, and Hoffman, at which it was agreed that Davis should try to communicate with witness Marks. The jury was clearly justified in finding that, when Davis contacted Marks, he did what Halperin and the others intended he should do. *Nye & Nissen* v. *United States*, 336 U. S. 613, 619–620. And these acts, as the court below held, plainly constituted an improper tampering with a witness. *United States* v. *Russell*, 255 U. S. 138, 143; *Hicks* v. *United States*, 173 F. 2d 570 (C. A. 4), certiorari denied, 337 U. S. 945.

Counts 6 and 7 charge Halperin with corruptly endeavoring, on March 15 and 18, 1952, to influence Berman and Tobias, who were connected with Gotham Beef, to withhold information when they were called before the grand jury. The evidence showed that Halperin knew that Berman and Tobias expected to be subpoenaed before the grand jury. It also established that Davis, acting for the conspirators, first met with Berman and Tobias and asked them not to talk

when called before the grand jury. Several days later, when Halperin met Tobias and Berman, he told them that the Pattullo Modes people had talked to the grand jury, that it was a terrible thing, and that he hoped that Berman would not do the same as he had done Berman a good turn. Halperin then informed Tobias and Berman that neither he, Halperin, nor his Washington associate would talk (see the Statement, *supra*, p. 18). On the basis of the evidence, the jury was warranted in finding Halperin guilty on counts 6 and 7.

The argument that Halperin acted as an attorney when he advised the witnesses Berman and Tobias to invoke the Fifth Amendment before the grand jury is totally unfounded. Tobias' testimony was that Halperin never specifically mentioned the Fifth Amendment to the witnesses, saying only that he hoped the witnesses would not talk (R. 183–184). Nor was there any evidence that an attorney-client relationship subsisted between Halperin and the witnesses at the time he talked to them; indeed, the testimony that he requested their silence because they owed him a favor negates the idea he was acting as an attorney advising them. In the absence of any showing that he was their attorney, he cannot rely on *United States* v. *Herron, et al.*, 28 F. 2d 122 (D. Calif.), holding that an attorney may not properly be charged with conspiring corruptly to influence a witness when he advises his client, a witness, to invoke the Fifth Amendment.

6. The contention of petitioner Bolich (No. 186, Pet. 14–15) that the evidence was insufficient to sus-

tain his conviction is answered by the opinion below (Vol. V. App. pp. 295–299). As appears from the Statement, *supra*, his conviction rests on far more than his friendly relationship with Grunewald. The jury could validly infer Bolich's role in the conspiracy from his own actions in the Pattullo, Modes and Gotham cases, following Grunewald's intervention and his calls in the name of "Captain Henry". Moreover, Bolich's actions in endeavoring to have a report on the Pattullo Modes case modified, and the testimony that he had obtained, and later denied, having the records of his occupancy of the Grunewald apartment, indicate a consciousness of guilt as well as overt acts of concealment. The subsidiary argument that the testimony as to the hotel records, and as to the construction of a hiding place for papers in September 1950, was improperly admitted (No. 186, Pet. 16–17), is without merit. This testimony was clearly pertinent enough to the main charge to be admissible in the trial court's discretion.

CONCLUSION

For the reasons stated, it is respectfully submitted that the petitions for writs of certiorari should be denied.

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